sary physical connection and rates are present to handle a movement. This Court, in rejecting such a construction in *Thompson, supra,* stated:

> *"In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."* (pp. 559, 560) (Emphasis supplied.)

We submit that there is no escape from the proposition that if the construction of the term "connecting lines," in Section 3(4) of the Act, 49 U.S.C. §3(4), urged by the appellant, were adopted, the term, of necessity, would embrace every railroad in this nation and, perforce, would make every railroad, regardless of where situated, the connecting line of every other raliroad. Complete nullification of the qualifying adjective "connecting" would result. Appellant's refusal to define the term "connecting lines" in its jurisdictional statement is mute proof of the validity of this statement.

CONCLUSION

Since this appeal presents no issue of substance warranting plenary consideration, the judgment of the District Court should be affirmed.

Respectfully submitted,

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November 13, 1964

PROOF OF SERVICE

I, FRANK S. FARRELL, Attorney for these Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1964, I served copies of the foregoing Motion to Affirm on the several parties as follows:

1. On the United States by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: Archibald Cox, Esq., The Solicitor General; William H. Orrick, Jr., Esq., Assistant Attorney General; Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D. C., and Cecil F. Poole, Esq., United States Attorney, San Francisco, California.

2. On the Interstate Commerce Commission by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: Robert W. Ginnane, Esq., General Counsel, and Robert S. Burk, Esq., Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On The Western Pacific Railroad Company, Sacramento Northern Railway Company and Tidewater Southern Railway Company, Appellants, by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: E. L. Van Dellen, Esq., and Walter G. Treanor, Esq., 526 Mission Street, San Francisco 5, California, and E. Barrett Prettyman, Jr., Esq., 800 Colorado Building, Washington 5, D. C.

FRANK S. FARRELL

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 598

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MEMORANDUM FOR THE UNITED STATES

As noted in the Jurisdictional Statement filed by the appellants, the United States supported the appellants in the proceeding which they instituted before the Interstate Commerce Commission. When appellants subsequently brought suit before the three-judge district court challenging the Commission's denial of relief, the United States was named as the statutory defendant pursuant to 28 U.S.C. 2322. The United States did not, however, join with the Commission in defense of the latter's order.

We agree with appellants, essentially for the reasons set forth in their Jurisdictional Statement, that the issue presented by this case, whatever its correct

755-588—64

resolution, is substantial both in terms of its economic implications and from the standpoint of transportation law. That issue, we believe, has not been authoritatively decided. Although the district court relied upon a decision of this Court, *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288, it seems to us quite doubtful whether *Atlantic Coast Line* lends any support for the result.[1] Even if it did, however, we would regard the point as one warranting plenary

[1] The court below cited *Atlantic Coast Line* for the proposition that a "connecting line within the meaning of Section 3(4) is one which has either a direct physical connection at the common interchange or is one which makes up a 'through route' through the interchange point" (J.S., p. 35a). It then reasoned that appellant Western Pacific does not provide a through route via Portland. This is true in the sense that the route is not commercially open (see *Thompson* v. *United States,* 343 U.S. 549), the northern carriers having declined (with minor exceptions relating to specified commodities) to establish joint rates with Western Pacific. However, a careful examination of *Atlantic Coast Line* suggests that the Court was speaking of a "through route" in the not unfamiliar sense of one that is physically available for the performance of a through service, the matter of competitive rates apart. In that sense, of course, Western Pacific is part of an existing through route via Portland.

examination in the important context in which it is here presented.[2]

Accordingly, we urge that probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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[2] If this case involves discrimination within the meaning of Section 3(4), 49 U.S.C. 3(4), as urged by appellants, it would plainly become the Commission's duty to order its elimination. *Chicago I. & L. Ry.* v. *United States*, 270 U.S. 287, 292. In that event, it is no answer that the Commission has the independent power to order the establishment of through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest" (Section 15(3), 49 U.S.C. 15(3)). *Ibid.* We note that the Commission's powers under Section 15(3) may be exercised when there is only one connecting line involved and hence no question of discrimination as between connecting lines.

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